(2)

Supreme Court, U.S.
FILED
AUG 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-98

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BRENDA PERKINSON, ELIZABETH PERKINSON, A MINOR, by her father and next friend, ALEX PERKINSON, as Administrator of the Estate of Ethel Perkinson, Deceased,

Petitioners,

VS.

MONTY MANION, REELFOOT PACKING CO., a Division of VALLEY DALE PACKERS; INTERSTATE PRODUCERS LIVESTOCK ASSOCIATION, a partnership or trade association, and JACK SCOVILLE, d/b/a SCOVILLE'S TAP ROOM,

Respondents.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Fifth District

BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

DUNHAM, BOMAN & LESKERA
520 First Illinois Bank Building
East St. Louis, Illinois 62201
(618) 271-0535

Attorneys for Reelfoot Packing Company

RUSSELL K. SCOTT
ERIC C. YOUNG
Of Counsel

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE QUESTION PRESENTED BY PLAINTIFFS WAS PROPERLY RAISED SO AS TO GIVE THIS COURT JURISDICTION TO REVIEW THE JUDGMENT ON WRIT OF CERTIORARI.

II. WHETHER THE INTERSTATE COMMERCE ACT IMPOSES A DUTY UPON A PARTY WHO CONTRACTS WITH A MOTOR CARRIER TO ASSURE MAINTENANCE OF MINIMUM LEVELS OF LIABILITY INSURANCE.

TABLE OF CONTENTS

	Page
Opinions Below	1
Statutes and Regulations Involved	2
Corrected Statement of the Case	5
Reasons for Not Granting the Writ	6
Conclusion	11

TABLE OF AUTHORITIES

Page

Cases:

Hershberger v. Home Transport Company, 103 Ill. App. 3d 348, 431 N.E.2d 72, 59 Ill. Dec. 53 (2nd Dist., 1982) 9

Jenkins v. Wu, 102 Ill.2d 468, 468 N.E.2d 1162, 82 Ill. Dec. 382 (1984) 6

Kreider Truck Service, Inc. v. Augustine, 76 Ill.2d 535, 394 N.E.2d 179, 31 Ill. Dec. 802 (1979) 8,9

Zimring v. Wendrow, 137 Ill. App. 3d 847, 485 N.E.2d 478, 92 Ill. Dec. 667 (2nd Dist., 1985) 6

Other Authorities:

Illinois Supreme Court Rule 341(e)(7) 6

49 U.S.C. Section 10927 6,7,8

49 U.S.C. Section 10922 8

49 U.S.C. Section 11107 6,7

49 U.S.C. Section 10526(a)(6)(A) 7,8,9

Section 30 of the Motor Carrier Act of 1980 6,8,9

49 C.F.R. Section 387.1 6,8

United States Supreme Court Rule 21.1(h) 7

No. 88-98

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BRENDA PERKINSON, ELIZABETH PERKINSON, A MINOR, by her father and next friend, ALEX PERKINSON, as Administrator of the Estate of Ethel Perkinson, Deceased,

Petitioners,

VS.

MONTY MANION, REELFOOT PACKING CO., a Division of VALLEY DALE PACKERS; INTERSTATE PRODUCERS LIVESTOCK ASSOCIATION, a partnership or trade association, and JACK SCOVILLE, d/b/a SCOVILLE'S TAP ROOM,

Respondents.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Fifth District

BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Circuit Court for the Third Judicial Circuit, Madison County, Illinois, granted Summary Judgment in favor of Defendants INTERSTATE PRODUCERS LIVESTOCK ASSOCIATION and REELFOOT PACKING COMPANY and against Plaintiff (Appeal No. 5-86-0628), and denied Defendant REELFOOT PACKING COMPANY'S Motion for Summary Judgment (Appeal No. 5-86-0628). Plaintiffs and Defendant

REELFOOT separately appealed the decisions of the Circuit Court to the Appellate Court of Illinois, Fifth District. After consolidating the appeals, the Appellate Court affirmed the decision of the Circuit Court below granting Defendants INTERSTATE PRODUCERS LIVESTOCK ASSOCIATION and REELFOOT PACKING COMPANY'S Motions for Summary Judgment and reversed the decision of the Circuit Court denying Defendant REELFOOT PACKING COMPANY'S Motion for Summary Judgment. *Perkinson v. Manion*, 163 Ill. App. 3d 262, 516 N.E.2d 977, 114 Ill. Dec. 822 (5th Dist. 1987). Leave to appeal to the Supreme Court of Illinois was denied.

STATUTES AND REGULATIONS INVOLVED

49 U.S.C. Section 10526

§10526. Miscellaneous motor carrier transportation exemptions
a) The Interstate Commerce Commission does not have jurisdiction under this subchapter [49 USCS §§ 10521 et seq.] over-

(6) a motor vehicle carrying for compensation, only property and that property consists of-

(A) ordinary livestock;

49 U.S.C. Section 10927

§10927. Security of motor carriers, brokers, and freight forwarders
(a)(1) the Interstate Commerce Commission may issue a certificate or permit to a motor carrier under section 10922 or 10923 of this title [49 USCS § 10922 or 10923] only if the carrier files with the Commission a bond, insurance policy, or other type of security approved by the Commission.

49 U.S.C. Section 10922

§10922. Certificates of motor and water common carriers
(a) Except as provided in this section and section 10930(a) of this title [49 USCS § 10930(a)], the Interstate Commerce Commission shall issue a certificate to a person authorizing that person to provide transportation subject to the jurisdiction of the Commission under subchapter II or III of chapter 105 of this ti-

tle [49 USCS §§ 10521 et seq. or 10541 et seq.] as a motor common carrier or water common carrier, respectively, if the Commission finds that . . .

49 U.S.C. Section 11107

§11107. Leased motor vehicles

(a) Except as provided in Section 11101(c) of this title [49 USCS §11101(c)], the Interstate Commerce Commission may require a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title [49 USCS §§ 10521 et seq.] that uses motor vehicles not owned by it to transport property under an arrangement with another party to-

(1) make the arrangement in writing signed by the parties specifying its duration and the compensation to be paid by the motor carrier;

(2) carry a copy of the arrangement in each motor vehicle to which it applies during the period the arrangement is in effect;

(3) inspect the motor vehicles and obtain liability and cargo insurance on them; and

(4) have control of and be responsible for operating those motor vehicles in compliance with requirements prescribed by the Secretary of Transportation on safety of operations and equipment, and with other applicable law as if the motor vehicles were owned by the motor carrier.

(b) The Commission shall require, by regulation, that any arrangement, between a motor carrier of property providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title [49 USCS §§ 10521 et seq.] and any other person, under which such other person is to provide any portion of such transportation by a motor vehicle not owned by the carrier shall specify, in writing, who is responsible for loading and unloading the property onto and from the motor vehicle.

Section 30, Motor Carriers Act of 1980

Minimum financial responsibility for motor carriers. Act July 1, 1980, P.L. 96-296, § 30, 94 Star, 820; Jan. 6, 1983, P.L. 97-424, Title IV, Part A, § 406, 96 Stat. 2158 provides:

(a)(1) The Secretary of Transportation shall establish regulations to require minimal levels of financial responsibility sufficient to satisfy liability amounts to be determined by the Secretary covering public liability, property damage, and environmental restoration for the transportation of property for hire by motor vehicle in the United States from a place in one State to a place in another State, from a place in a State to another place in such State through a place outside of such State, or between a place in a State and a place outside the United States.

(d)(1) Any person (except an employee who acts without knowledge) who is determined by the Secretary, after notice and opportunity for a hearing, to have knowingly violated this section or a regulation issued under this section shall be liable to the United States for civil penalty of not more than $10,000 for each violation and if any such violation is a continuing one each day of violation constitutes a separate offense. The amount of any such penalty shall be assessed by the Secretary by written notice. In determining the amount of such penalty, the Secretary shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the person found to have committed such violation, the degree of culpability, and history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

49 C.F.R. Section 387.1

§387.1 Purpose and Scope.

This part prescribes the minimum levels of financial responsibility required to be maintained by motor carriers of property operating motor vehicles in interstate, foreign, or intrastate commerce. The purpose of these regulations is to create additional incentives to motor carriers to maintain and operate their

vehicles in a safe manner and to assure that motor carriers maintain an appropriate level of financial responsibility for motor vehicles operated on public highways.

CORRECTED STATEMENT OF THE CASE

Defendant Manion was the owner of a tractor-trailer involved in a collision with the plaintiffs. (C-470). Manion was requested by Defendant Reelfoot Packing Company (hereinafter referred to as Reelfoot),[1] a packinghouse, to pick up and deliver a load of hogs. (C-436, C-484-486, C-360). Reelfoot owned no trucks for use in the transportation of livestock. (C-412-413). Manion failed to carry liability insurance (C-486, 488).

Plaintiffs have sought relief against Reelfoot in Counts XXIII-XXVII of their Second Amended Complaint on the theory that Reelfoot had a duty under 49 U.S.C. Sections 10927 and 11107 to insure that Manion carried the statutory required minimum insurance (C-562-569). Reelfoot filed a Motion for Summary Judgment as to these counts, which was granted by the trial court (C-333, C-681). While Plaintiffs filed a Notice of Appeal in the Appellate Court of Illinois, Fifth District, on this aspect of the court's order (C-685), they failed to argue this point in their Appellant's brief before the Appellate Court of Illinois, Fifth District, but limited reference to Reelfoot only as to an issue not raised in the Petition for Writ of Certiorari.

The Appellate Court of Illinois, Fifth District, affirmed the trial court's order without reference to plaintiffs' appeal as to Reelfoot on the issues before this Court. The Supreme Court of Illinois denied Plaintiff's Petition for Leave to Appeal.

---

[1]Defendant Reelfoot Packing Company is a ficticious name used by Valleydale Packers, Inc. which has no parent company or subsidiaries.

REASONS FOR NOT GRANTING THE WRIT

I.

THE QUESTION PRESENTED BY PLAINTIFFS WAS NOT PROPERLY RAISED SO AS TO GIVE THIS COURT JURISDICTION TO REVIEW THE JUDGMENT ON WRIT OF CERTIORARI.

Plaintiffs have failed to timely and properly raise their question for review as to Defendant Reelfoot so as to give this Court jurisdiction to review the judgment on a writ of certiorari. The question for review presented to this Court by plaintiffs concerns the applicability of federal statutes and regulations as to defendant Reelfoot. In Counts XXIII-XXVII of the plaintiffs' Second Amended Complaint they relied on 49 U.S.C. Sections 10927 and 11107 for the proposition that defendant Reelfoot had a duty to insure that truckers under its hire carry required minimum insurance. The trial court, after finding no merit to plaintiffs' proposition, granted defendant Reelfoot's motion for summary judgment on this issue.

Plaintiffs argued for the first time in their brief before the Appellate Court of Illinois, Fifth District that liability may be imposed by Section 30 of the Motor Carrier Act of 1980 and the regulations promulgated in support thereof found at 49 CFR Sections 387.1, *et. seq.* However, plaintiffs failed to argue in their brief that these statutes and regulations applied to Reelfoot but only argued that they applied to defendants ILPA. Plaintiffs' failure to argue this issue in their brief constituted a waiver of this point on appeal pursuant to Illinois Supreme Court Rule 341(e)(7). See also *Jenkins v. Wu*, 102 Ill. 2d 468, 468 N.E.2d 162, 82 Ill. Dec. 382 (1984); *Zimring v. Wendrow*, 137 Ill. App. 3d 847, 485 N.E.2d 478, 92 Ill. Dec. 667 (2nd Dist. 1985). The decision of the Appellate Court made no reference to plaintiffs' appeal as to defendant Reelfoot but only discussed this issue as to defendant ILPA.

Since the question for review proposed by the plaintiffs to This Court was not presented in their pleadings in the trial court nor presented on review as to defendant Reelfoot before the Appellate Court of Illinois, Fifth District, which constituted a waiver of this point on appeal under Illinois law, no credible argument can be made that this question is properly before this Court. Furthermore, no attempt was made by plaintiffs to comply with Supreme Court Rule 21.1(h) to show the method or manner of raising these issues in the courts below or the way in which they were passed upon by these courts.

Since the federal question was not timely and properly raised below, this Court is without jurisdiction to review the judgment on a writ of certiorari.

II.

THE INTERSTATE COMMERCE ACT IMPOSES NO DUTY UPON A PARTY WHO CONTRACTS WITH A MOTOR CARRIER TO ASSURE MAINTAINANCE OF MINIMUM LEVELS OF LIABILITY INSURANCE.

If the court finds that it has jurisdiction to review plaintiffs' petition, then the question presented for this Court's review must be addressed. Counts XXIII-XXVII of plaintiffs' Second Amended Complaint seek to impose liability upon defendant Reelfoot under the theory that it had a duty under 49 U.S.C. Sections 10927 and 11107 to insure that independent truckers under its hire carry the statutorily required minimum insurance. Manion was exempt from the jurisdiction of the Interstate Commerce Commission (hereinafter referred to as ICC) under 49 U.S.C. Section 10526(a)(6)(A) which exempts for-hire carriers of livestock.

Plaintiffs seem to argue here that Manion had a duty to maintain minimum insurance under 49 U.S.C. Section 10927 and that Manion's failure to procure liability insurance imposes liability upon Reelfoot by the application of the Illinois

Supreme Court's holding in *Kreider Truck Service, Inc. v. Augustine*, 76 Ill. 2d 535, 394 N.E.2d 1179, 31 Ill. Dec. 802 (Ill., 1979). (No mention is made of Section 10927 in plaintiffs' reason for granting a writ but reference is made to this section in plaintiffs' citation of applicable statutes.) This argument fails under scrutiny of the statutory language and the regulations promulgated in support thereof.

Section 10927 provides that a motor carrier may only receive a certificate from the ICC if it files adequate security with the ICC. However, this requirement only applies to carriers subject to Sections 10922 or 10923 of Title 49. A review of section 10922, which is applicable to motor carriers, reveals that it is applicable only to those motor carriers subject to the jurisdiction of the ICC under Chapter 105 of Title 49 (49 U.S.C. Sections 10521, *et. seq.*) Since Section 10526 exempts livestock carriers from the jurisdiction of the ICC, Section 10927 cannot apply to Manion.

Plaintiffs also argue that this liability may be imposed by the Motor Carrier Act of 1980 and the regulations promulgated in support thereof found in 49 CFR Sections 387.1, *et. seq.* These regulations find their origin in Section 30 of the Motor Carrier Act of 1980, which is uncodified (it can be found after 49 U.S.C. 10927 in USCA and USCS).

Reelfoot recognizes that Section 30 requires for-hire motor carriers to maintain a minimum level of financial responsibility. However, nowhere in the provision is there any indication that one who hires a for-hire motor carrier has a duty to assure compliance with the insurance requirement. An illustration of the lack of intent of the statute to extend a duty to those who hire motor carriers can be found in the regulations promulgated in support of Section 30. Section 387.1 clearly states that minimum levels of insurance are to be maintained by *motor carriers* and that the purpose of the regulations is to give incentive to *motor carriers* to maintain financial responsibility. (Emphasis added).

The complex ICC statutory and regulatory scheme which were addressed in *Kreider Truck Service, Inc. v. Augustine*, 76 Ill. 2d 535, 394 N.E.2d 1179, 31 Ill. Dec. 802 (1979) and *Hershberger v. Home Transport Company*, 103 Ill. App. 3d 348, 431 N.E.2d 72, 59 Ill. Dec. 53 (2nd Dist. 1982), cited by plaintiffs is not present in this case. First, Manion was exempt from the jurisdiction of the ICC under 49 U.S.C. 10526(a)(6)(A). Second, the arrangement between Reelfoot and Manion was not as lessor-lessee, as was the situation in *Kreider* and *Hershberger*. Manion owned, operated and maintained his own truck and the state court determined conclusively that no relationship existed between Manion and Reelfoot which would give rise to any responsibility on the part of Reelfoot.

The duty imposed upon a third party in *Hershberger* and *Kreider* arose from the public policy clearly stated by the United States Congress in the Interstate Commerce Act (49 U.S.C. 10301, *et. seq.*). The United States Congress had the power and opportunity to impose a duty upon those who hire motor carriers in interstate commerce exempt from the jurisdiction of the ICC, but did not do so. Without the necessary statutory language and intent, Reelfoot can be held to no duty to insure Defendant Manion's compliance with Section 30 of the Motor Carrier Safety Act.

The argument espoused here for the first time by plaintiffs did not appear until after Reelfoot had filed its motion for summary judgment directed to plaintiff's complaint and First Amended Complaint. Plaintiffs seek to have this Court create a new requirement not heretofore recognized and impose it retroactively on a defendant not in the business of owning and operating trucks. Even if it could be established that such a duty upon Reelfoot is in the public interest (a considerable leap of faith from the regulations noted), such a decision is not for the courts to impose retroactively in such a tenuous personal injury action, but should be left to the dispassionate exercise of the legitimate legislative and rule making function of the agencies,

commissions and legislative bodies charged with this responsibility.

The statutes involved here and the rules promulgated therefrom are, on their face, not directed to Reelfoot. Reelfoot is not a for-hire carrier and any possible connection between Reelfoot and Manion here involves the transportation of livestock, an excluded occupation under the ICC rules and regulations. To now declare Reelfoot responsible for Manion's conduct more than four years ago based upon a bootstrapped public policy argument would be judicial legislation raised to a frightening degree. The trial court, Appellate Court, and Supreme Court of Illinois considered each of the arguments plaintiffs have put forth here and rejected each of them.

Certainly plaintiffs have failed to show This Court any basis for a finding that the question presented is special and important to justify This Court's exercise of its discretion in granting plaintiffs' petition for writ of certiorari.

CONCLUSION

Plaintiffs have failed to properly present the question presented for review in the courts below and therefore it is not properly before This Court. Even if properly before This Court, plaintiffs have failed to show that the question presented is an important question of federal law that should be settled by This Court or that the question presented is meritorious.

For all the foregoing reasons, Respondents urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

DUNHAM, BOMAN &
LESKERA
Attorneys for Reelfoot Packing
Company

520 First Illinois Bank Building
East St. Louis, Illinois 62201
(618) 271-0535

Russell K. Scott
Eric C. Young
of Counsel

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. 88-98

Brenda Perkinson, Elizabeth Perkinson, a minor, by her father and next friend, Alex Perkinson; and Alex Perkinson, Administrator of the Estate of Ethel Perkinson, Deceased,

Petitioners,

v.

Monty Manion, Reelfoot Packing Company, a Division of Valley Dale Packers; Interstate Producers Livestock Association, and Jack Scoville, d/b/a Scoville's Tap Room,

Respondents.

PROOF OF SERVICE

STATE OF ILLINOIS)
) ss
COUNTY OF ST. CLAIR)

The undersigned, an employee of the Law Firm of DUNHAM, BOMAN & LESKERA, being first duly sworn, upon oath, state that I personally mailed true and correct copies of the Brief in Opposition to Petitioners' Petition for a Writ of Certiorari by placing the same in an envelope clearly addressed and with sufficient postage, in the U.S. Mail Box in front of 520 First Illinois Bank Building, East St. Louis, Illinois, 62201, at 4:00 p.m. to Richard Shaikewitz, 620 East Third Street, Alton, Illinois, 62002, Madelyn Lamb, P.O. Box 510, Edwardsville, Illinois, 62025, Michael Katz, 1933 Vandalia, Collinsville, Illinois 62234, and Michael Constance, 201 South Illinois, Belleville, Illinois, 62220, on this 12th day of August, 1988.

Subscribed and sworn to before me, a Notary Public, in and for the State of Illinois, County of St. Clair, this 12th day of August, 1988.

_____